

TOWN OF CUSHING
PLANNING BOARD
Minutes of Meeting
June 6, 2007
Approved 6/28/07

Board Present: Chairman Dan Remian, David Cobey, Bob Ellis, Evelyn Kalloch, CEO Scott Bickford and Recording Secretary Ann Aaron

Absent: Frank Muddle

1. Call to Order: Chairman Remian called the meeting to order at 6:03 P.M. and took a roll call. He noted that the agenda would be taken out of order because applicants Molly and James Loic had not yet arrived.

2. Minutes of 5/2/07: Mr. Remian said that he had a couple of statements in reference to the minutes. On Page 2, Mr. Remian said, the last sentence of the 4th paragraph from the bottom said Mr. Baker had said it should be the least intrusive route. Similarly, Mr. Muddle had noted in the next to last paragraph on that page, that "Mr. Baker had charged the Board with deciding what had the lesser impact." Mr. Ellis said Mr. Baker also said it had to be outside of RP, but Mr. Remian disagreed with that. Mr. Ellis said this had been included in one of Mr. Baker's letters and Mr. Remian said that was Mr. Baker's preference but that, if it had to be in RP, it should be of the least impact.

Mr. Remian referred the Board to Page 3, last sentence in 4th paragraph: "Mr. Tower noted that the DEP had seen and approved these plans." Mr. Remian stated he had since talked with DEP and they had never seen the plans that Mr. Tower was talking about, so they could not have approved them.

ACTION: Mrs. Kalloch made a motion, seconded by Mr. Cobey, to approve the minutes.
Carried 4-0-0

3. Jonathan Harrington and Judith Bing, 56 Raccoon Road, Application for Proposed 20'x38' Addition to Existing Dwelling, Map 5, Lot 106-4 in Shoreland Zone: Mr. Remian confirmed that the addition would not exceed 35' in height. Mrs. Kalloch asked if the septic system would be adequate to support the additional bedroom. Mr. Harrington responded that he was actually replacing an existing bedroom with a new one, so there would be no increase in the number of bedrooms. CEO Bickford said he saw no problems with the proposal. Mr. Remian said the addition would be 230' from the high water, beyond the 75' setback requirements of the Shoreland Zone Ordinance [SZO].

The chairman said he would like the Board to go through the requirements of Subsection 16(E)(3) of the SZO and Mr. Ellis suggested also reviewing Subsection 15(B)(1). Chairman Remian started with 15(B)(1) and said the application met the setback from Salt Pond; the 35' structure height limit would not be exceeded; the total area of the structure would not exceed 20% of the lot; the driveway would not change and the shoreline would not be affected. The chairman then moved on to Subsection 16(E)(3), reviewing each of the nine items for compliance; no questions were raised by the Board members.

ACTION: Mr. Ellis made a motion, seconded by Mr. Remian, to make a positive finding of fact that the information supplied by the applicant met the requirements of Subsection 16(E)(3)
Carried 4-0-0

CEO Bickford said he would issue a permit for the project.

4. Alan and Monica Magee, Driveway Entrance Permit, Map 5, Lot 71B in Shoreland Zone: Mr. Ellis noted that this was also an application for a use permit. Mr. Remian confirmed with the applicant that this driveway would be slightly north of the present one. Mr. Remian said the Board would follow the same procedure as in the previous application. Looking at Subsection 15(G)(2), the chairman asked if the ground was fairly flat at the proposed driveway location and was told that it ran very slightly uphill. He said the application met the setback and slope requirements of 15(G)(2) and was not in Resource Protection [RP]. Moving on to Subsection 16(E)(3), Mr. Remian read through the nine items without comment by the Board members.

ACTION: Mr. Cobey made a motion, seconded by Mrs. Kalloch, to make a positive finding of fact based on Subsection 15(E)(3)(a-i).
Carried 4-0-0

CEO Bickford said he would issue a permit to the applicants. Monica Magee asked if there was a width requirement for the gravel-surfaced driveway. The CEO said that the DOT permit listed a width of 15', though he thought it would not be a problem if it were less.

5. Old Business: CEO Bickford quoted Mr. Tower as saying at the last meeting that he (the CEO) had misplaced some Mylars and plans. Mr. Bickford said the Town Clerk had been holding the materials for Mr. Tower to pick up. The CEO said he had also sent Mr. Tower a letter asking him to pick up a group of subdivision amendment applications, which the Town Clerk was also holding.

6. New Business: Mrs. Kalloch suggested setting a new meeting date for July since the regular date would fall on the 4th of July. The Board agreed to move the meeting to July 18 at 6:00 P.M. The Board agreed to start all future meetings at 6:00 P.M. and asked Chet Knowles to note this on the town website.

Mr. Ellis said there was a typographical error on Page 13 of the changes to the SZO. Under #17 (Land Use Table,) he said there was section "A" for temporary piers and docks and section "B" for permanent piers and docks. Mr. Ellis said they should both show the CEO as the appropriate permitting person, while only "A" did so. Mr. Ellis asked if this could be fixed without holding hearings. Mr. Remian said he would check with the town's legal counsel and the DEP but said it was likely a hearing would be required.

Mr. Cobey said he had sent CEO Bickford observations regarding Mr. Tower's request for comments that might help him. He asked that his observations be included in the record. Mr. Cobey said he had some technical understanding of the submittals from working with civil engineers for thirty years; however, he was not competent to perform technical review of the more detailed technical submittals. Mr. Remian stated that he had done civil engineering and soil calculations but was not licensed in the state of Maine.

The CEO suggested that Board members not email each other but send any comments to him or the Town Clerk; this would avoid the appearance of an unscheduled meeting. Mrs. Kalloch said she felt email should be avoided and any comments should be sent to the Town Clerk in written form. Mr. Ellis said he thought the Board should seek clarification from Attorney Cunningham on how this should be handled. Mr. Remian said that Mr. Cunningham had told him that email should be avoided due to the possibility that the perception of bias or conflict of interest could result in the FOAA and confiscation of computers. Mr. Ellis said the MMA manual said PB members should not talk with the CEO regarding applications. Mr. Remian clarified for Mrs. Kalloch that members could speak with the CEO concerning procedures or interpretation of ordinances, but not about a particular application. Mr. Cobey said he would like to see this become a matter of written policy, perhaps including it in the by-laws.

7. Continuation of Robbins Mountain Subdivision Review, Map 5, Lots 84, 85 and 86: Chairman Remian said the Board would be reviewing the Robbins Mountain June 2006 application by using existing subdivision regulations and the old SZO, dated March 2001. Mr. Ellis asked the Board to confirm that no new submittals were required for this application. Mr. Cobey recalled the Board's noting that there was no test pit for Lot 1 and some dimensions for Pleasant Point Road were missing.

At this time the Loics arrived and the Board took up their application.

8. James and Molly Loic, Sheep Point Lane, Application for Building Permit, Map 5, Lot 87 in Shoreland Zone: The Loics confirmed for the chairman that this would be a new structure to replace the trailer they were currently using. Mr. Remian ascertained that the Loics' septic field was in place and the CEO said it was in compliance. Mr. Ellis said he had noticed two different drawings, only one of which showed a driveway. Mr. Loic said they actually drove over an open field, labeled "unpaved driveway" on the plan; the noted "unpaved road" was an old ROW. Mr. Ellis then ascertained that part of the driveway would be within the 250' of the Shoreland Zone. Mr. Remian confirmed that the applicants were also asking for a driveway.

Chairman Remian then read aloud the conditions in the new SZO Subsection 15(B) and the Board saw no issues. The chairman then proceeded to Subsection 16(E)(3), which also raised no questions.

ACTION: Mr. Ellis made a motion, seconded by Mr. Remian, for a positive finding on Subsection 16(E)(3) that the applicant would comply with all conditions listed.
Carried 4-0-0

CEO Bickford asked if IF&W identified that area for fish and wildlife. Mr. Remian responded that Mr. Kemper had identified it as a waterfront wading bird habitat and a shoreland bird roosting area, but concluded that it contained no essential or significant wildlife habitats. Mr. Ellis said it seemed that the applicant would not adversely impact this area if other residents hadn't, even though it was on the wildlife map.

ACTION: Mr. Ellis made a motion, seconded by Mr. Remian, to approve the application.
Carried 4-0-0

The CEO said he would write the permit and mail it to the Loics' home address.

7.Continuation of Robbins Mountain Subdivision Review, Map 5, Lots 84, 85 and 86: Mr. Cobey asked about the sections and criteria for review. Mr. Remian said the Board would go through Sections 7, 8 and 9 of the Subdivision Ordinance [SO], as well as the standards if they applied. Mr. Tower said he would like to comment on the proceedings to date on this application. The developer thanked Mr. Cobey for presenting his written comments in a timely manner. His first response was that the storm water plan was being reviewed by DEP and that it was not required that 100% of the water be treated. Mr. Tower said his applications for amendment to his subdivisions were presented after Mr. Remian said that amendments were acceptable under the moratorium. Mr. Tower said he had received a letter from the CEO saying that these amendments would not be on the agenda. When asked by Mr. Remian, Mr. Tower said there was one amendment allowing for septic system relocation for all lots in each of his three approved subdivisions; this was done so the Board could avoid applications from each individual lot owner. Mr. Tower did not understand why they were rejected. CEO Bickford said he saw these applications as being amended plans, unseen by the Board. He had checked with Attorney Cunningham who had said the moratorium precluded any applications being accepted. In addition, the surveyor had adjusted some pin locations because of obstacles and these new locations were shown in the amended plans. Mr. Bickford said he had refused other applications due to the moratorium, which would expire soon.

Mr. Cobey asked whether the PB had the current storm water plan, if Mr. Tower wanted the Board to act on it and when the DEP could be expected to take action on it. Mr. Tower responded that the PB lacked standards on this and had no specific criteria to review a storm water plan, which could affect things the PB did review. Mr. Tower said he expected a response from the DEP in a week or so, adding that he had recently submitted a photograph in response to a DEP request. Mr. Ellis asked if the DEP's previously requested corrections to the storm water plan had been resolved and when. Mr. Tower replied that those corrections had been approved, with the exception of the criteria for scenic character. Mr. Cobey asked if the plan the Board had, dated November 2006, was the latest. Mr. Tower responded that a residential meadow buffer was included in the latest plan.

The developer said that a DEP representative had told him its regulations stated that "unsightly development will be shielded from protected waters." Mr. Tower said that because the St. George River was protected and the DEP did not want to see any houses from the river, it was just "sitting" on the application. Mr. Tower then referred to Mr. Remian's comments at the beginning of the meeting regarding the 5/2/07 minutes. He said that plan profiles and cross sections for Lot 26 had not been seen by the DEP because they generally did not evaluate such information, leaving those to municipal zoning boards. Mr. Remian responded that a Board member had suggested at the 5/2/07 meeting that DEP had approved the cuts and cross fills. The chairman had then called DEP to ask what criteria they used and discovered that they did not look at cuts and cross fills; he wanted the Board to be aware of this if it was depending on DEP for that review.

The chairman said the Board would begin the review criteria with Subsection 7.1 of the SO. He stated that the Board had asked for several new things and read the list from the previous month's minutes. Mr. Tower said it was his intention to follow that list and provide whatever he and the Board agreed upon. The Board determined it should be referring to the drawing stamped 4/18/07.

Mr. Tower said he believed the moratorium was illegal, had never met the required emergency criteria and the duration had been extended excessively by the extensive reworking of the SO regulations, which was beyond the scope the moratorium identified. The chairman reminded the developer that the Board was reviewing this application based on the old SO, dated 5/7/03.

Mr. Remian read aloud Subs. 7.1 and Mr. Ellis read aloud the applicant's 3/21/07 written assertions concerning 7.1(A-E) and each successive subsection. Mr. Cobey stated that many of the soils on the site were loams and silt loams on slopes exceeding 15%, which were likely to contribute to erosion; therefore, the plan would need additional independent inspection. Mr. Remian said there were some test pit locations on steep slopes, but these were estimates rather than definitive designs. Mr. Ellis asked if the DEP application had included the soil types. Mr. Tower responded that the DEP received a complete soils report. Mr. Cobey said the report showed soils on slopes greater than 15% and the study did not include Lot 1. He said that he would have to abstain on this item pending a resolution of this apparent contradiction. Mr. Tower asked if Mr. Cobey had gotten his slope information from the test pits and said he had repeatedly said the contours were developed from aerial photography. Mr. Cobey responded that slopes could not be accurately measured over long distances. Mr. Tower said each test pit had a localized measurement of the slope. Mr. Cobey agreed, but said the indication of the slope was for the entire area. Mr. Bickford said Mr. Tower was correct that a soil scientist could put a system in up to 20% slopes. Mr. Cobey said he was talking about an erosion issue rather than a test pit location.

Mr. Cobey stated that the test pits on Lots 2, 4, 5, 7, 10 & 11 were not sealed, while the application stated they were. Mr. Ellis asked if it was Mr. Cobey's objection that the soils in the area outside the study area had not been dealt with and approved by the state. Mr. Cobey responded that he was concerned that these were erosive soils on very steep slopes. He said the amount of erosion would be directly related to how much of the sites were cleared; in addition, any erosion would go into ditches that were already substantially full. Mr. Cobey stated that if there were no provisions in the covenants for capturing erosion materials during construction it would cause pollution. Mr. Ellis asked if the site evaluators and DEP took these things into consideration before approval. Mr. Cobey said this had nothing to do with septic systems and said that the ditches were already full of muck, which was an indication of what was happening on that hillside. Mr. Tower said that his applications to the town and the DEP stated that best management practices would be followed throughout construction. He said he was building a road, putting in a storm water system and putting in lot lines; he was not building houses and these questions had not been raised about any of his other approved subdivisions. The developer added that the town could adopt erosion control plans and make them part of the building process, but he had no control over what or how the ultimate owner of the lot might build. Furthermore, the subdivider was required by the DEP to give each lot owner a copy of the plan and drawing.

Mr. Remian said the Knox County soils report for the area in question was not kind to 1/3 of the site and Mr. Cobey said it was a generalized study. Mr. Cobey asked if residents were burdened in any way other than maintaining the erosion control provisions the developer put in place. Mr. Tower responded that they were obligated to follow the DEP best management practices manual. He said he must include reference to the department order in a number of ways: 1) when a sale was made the developer must obtain the buyer's written acknowledgement that he had received and read a copy of the DEP order and 2) reference to the department order must be included in the deed, which compelled them to comply with all the terms and conditions of the order. Mr. Ellis asked Mr. Cobey if he felt the best management practices required addressed his concerns about erosion and Mr. Cobey said he would find out from the DEP. The chairman reminded the Board that comments concerning erosion, pollution, drainage and wells were common at the Public Hearing. Mr. Tower said such comments from persons not qualified to make them should be ignored and Mr. Remian disagreed, saying the Board must address issues of public concern.

Mr. Cobey said his initial reading of the best management practices manual led him to believe that individual lot owners were exempt from compliance and his erosion concerns would not be alleviated without checking with the DEP. Mr. Ellis asked if Mr. Cobey felt there was undue impact on the pollution issue. Mr. Cobey responded that he knew there were highly erosive soils on steep slopes and he had to decide on the definition of "subdivision" to determine if it would contribute to erosion and pollution. Mr. Ellis said he was concerned about whether Mr. Cobey's reservations were going to influence his own vote on the first criteria. Mr. Cobey said he thought he agreed that the subdivision was the process and not the product; if the Board wanted to concern itself with what happened on the lots after the subdivision was made, this should be addressed locally in the town's land use documents.

Mr. Bickford said the burden of proof was on the applicant, the Board had the right to ask for outside help and if the Board could not come to a consensus the issue could be resolved with a vote. Mr. Remian said he still had concerns and asked the Board how it wanted to handle it. Mr. Cobey said erosion was in 7.1 and 7.4 and asked Mr. Tower what type of ditch stabilization he would do. The developer said he would follow the measures in the best practices manual, which he thought would require nearly all of the ditches to be rip rapped. Mr. Cobey then said he would be comfortable approving 7.1.

ACTION: Mr. Cobey made a motion, seconded by Mr. Ellis, for a positive finding on 7.1 (Pollution) because the proposed subdivision would not result in undue water or air pollution.
Failed 2-2-0

Mr. Cobey and Mr. Ellis voted in favor; Mr. Remian opposed because he felt he had insufficient information on soils and slopes and Mrs. Kalloch voted against because she wanted to better understand the situation. Mr. Cobey said the Board could stop here, because the vote would constitute a denial, or try to determine exactly what additional information was needed. Mr. Ellis stated that the Board was obligated to resolve the issue. Mrs. Kalloch said it did not make sense that the entrance road went downhill while the storm water collection went uphill. Mr. Cobey and Mr. Tower explained how this worked. Mr. Remian said the applicant himself had admitted that aerial photography contained a lot of error due to growth on the site and the chairman was concerned that the slopes were inaccurate and had been conveyed to the DEP inaccurately.

Mr. Cobey asked if any of the erosive soils on steep slopes were located where Mr. Tower would be doing construction; Mr. Remian said they were and pointed them out, saying there were no "actuals" shown. Mr. Cobey said the area the chairman pointed out did not involve steep slopes. He then referred to a Cole Engineering high intensity soil survey map, which showed soils and slopes in the mapping units (not just test pits) to demonstrate that the steeper slopes were not located where Mr. Tower would be doing construction. Mrs. Kalloch stated that any subject matter should be available to all of the Board members; Mr. Cobey and Mr. Remian said this information had been available in the office for months.

Secretary Ann Aaron asked if the town would be responsible if the PB approved a lot and then the owner found he could not build due to slope or for some other reason. Mr. Cobey said that was not a factor in this discussion but Mr. Remian said that the "buildability" of lots came into play in the standards section (Article 9). Mr. Tower reminded the Board that its attorney had said a complete application must be approved or denied within 60 days.

Mr. Ellis said 7.1 referred to the "proposed subdivision" and the Board must decide whether this was a subdivision or a collection of lots. Mr. Cobey said Mr. Tower was writing covenants that ran with the land and he could add specific criteria for the lot owners. Mr. Tower said that was not his responsibility and was covered by the DEP order. Mr. Cobey said he had never seen a DEP order and accepted Mr. Tower's offer to send him a copy of one for another of his Cushing subdivisions. Mr. Cobey then asked about a swale on Lot 4, which appeared to be headed toward a special detention area and asked if that swale would need to be cut in. Mr. Tower said it would and Mr. Cobey asked if there was other off-the-lot construction he would do. Mr. Tower said he had to dig a ditch, berm and install a level lip spreader to divert storm water to Level A soils. Mr. Cobey asked the chairman if he wanted independent advisory on the issue of erosion on the site. The chairman said he did not, but the slope of the land, the soils and their ability to take care of pollution concerned him because the slopes were inaccurately depicted; he saw no ground control points. Mr. Tower responded that the roadway had been profiled in detail using ground methodology. He explained that, though the contours were generalized, the roads and storm water drainage had been designed from the ground with GPS; he had explained this to the DEP. Mr. Remian said his concerns were eased by learning that the detail work had been accomplished by ground methods. Mrs. Kalloch asked that water flow in several areas be clarified and Mr. Tower explained them to her.

ACTION: Mr. Ellis made a motion, seconded by Mr. Remian, for a positive finding of fact on 7.1 (Pollution), based on the detailed information submitted by the applicant and the discussion by the Board about the storm water issues.
Carried 4-0-0

ACTION: Mr. Cobey made a motion, seconded by Mr. Ellis, for a positive finding on 7.2 (Sufficient water), based on information submitted by the applicant.
Carried 4-0-0

The Board noted that 7.3 (Municipal water supply) did not apply. Moving on to 7.4 (Erosion), Mr. Cobey asked the developer how he would handle topsoil cleared during construction and Mr. Tower gave a detailed explanation. Mr. Remian asked for a note on the plan that stated there would be no stockpiling on site; Mr. Tower agreed.

ACTION: Mr. Remian made a motion, seconded by Mrs. Kalloch, to table action on 7.4 (Erosion), until DEP comments and approval were available.
Carried 4-0-0

ACTION: Mr. Remian made a motion, seconded by Mrs. Kalloch, for a positive finding of fact on 7.5 (Traffic), based on information submitted by the applicant
This motion was withdrawn

Mr. Cobey said he thought the entrance to the subdivision was dangerous, citing a 10% hill and two turns requiring vehicles to slow considerably. He said this required a 3% gradient for the last 50' but was 3% for only the last 35'. Mr. Cobey said this was a dangerous private road design that could effect what happened on the public road it intersected. Mrs. Kalloch said the DOT had approved the road but the chairman said they approved the sightline only. Mr. Ellis read aloud Subs. 9.9(J). Mr. Tower said the road conformed to this and the Board looked at the road plan details. Mr. Tower stated that two different vertical data were used in two different places, so Mr. Cobey concluded the Board had insufficient information. Mr. Tower said he could easily rectify the situation by slightly reducing the grade into the vertical curve. Mr. Cobey then asked Mr. Tower if he would pave the first 15' of the road to preclude stones from going onto the public road and Mr. Tower said he would.

ACTION: Mr. Remian made a motion, seconded by Mrs. Kalloch, that we approve 7.5 (Traffic) with the conditions that it meet our road standards 9.9(J) and that there be a paved apron for 15'.
Carried 4-0-0

Mr. Remian read aloud Subs. 7.6 (Sewage disposal) and Mr. Cobey said he would like to see the test pits for Lots 2, 4, 5, 7, 10 & 11 sealed, as well as seeing something on Lot 1. Mr. Cobey asked about nitrate plumes, mentioned at an earlier meeting, and Mr. Remian explained that they could be a concern when septic systems were present with these types of soils and slopes. Mr. Remian said, and Mr. Tower confirmed, that the system had been redesigned to remove stacking of plumes.

ACTION: Mr. Ellis made a motion, seconded by Mr. Cobey, that we table this criterion until the submittals have been provided for 7.6 (Sewage disposal).
Carried 4-0-0

The Board agreed that 7.7 (Municipal solid waste and sewage disposal) did not apply. Moving on to 7.8 (Aesthetic, cultural and natural values), Mr. Remian said there had been many comments at the Public Hearing and many letters received concerning this criterion, which also concerned the DEP. Mr. Cobey asked Mr. Tower if he correctly understood that there would be no clearing of individual lots by the developer. Mr. Tower said there would be tree removal and grooming on the lots, similar to what had been done on his other subdivision lots; there would be no stumping and no soil disturbance. Mr. Ellis asked if the subdivision covenants said lot owners could not remove any healthy trees; Mr. Tower said they did. Mr. Remian said the application indicated that most lots would be cleared for views and asked to what extent. Mr. Tower said they would be cleared by 20% to 90%, depending on the lot; it was his intention that the building envelopes on the lots have water views. Mrs. Kalloch reminded the applicant that he could not cut in the shoreland area. Mr. Remian said he would like to see a forestry plan reflecting the extent of tree removal because it affected the storm water and drainage ditches. Mr. Tower said he was obligated to include a building envelope on each lot, cleared and converted to lawn, though the covenants discouraged lawns. Mr. Remian said the drainage calculations made no mention of clearing for views. Mr. Tower said he did not want to convert the land from tree growth but rather wanted to change some of the species to fruit trees, which would not grow tall enough to obscure the view. The chairman said the Board had no documentation to prove this assertion and the developer said it was in the deed covenants.

ACTION: Mr. Remian made a motion, seconded by Mrs. Kalloch, to table the application until the next meeting.
Carried 4-0-0

The Board agreed to meet on June 20 at 6:00 P.M. to continue reviewing the application. Mr. Tower said he would have all necessary information on hand at that time.

9. Adjournment: The meeting adjourned at 9:10 P.M.

Respectfully submitted,

Deborah E. Sealey
Recording Secretary